



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 16, 2003

Ms. Cynthia Villareal-Reyna
Section Chief, Agency Counsel Section
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-0339

Dear Ms. Villareal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175168.

The Texas Department of Insurance (the "department") received a request for several private passenger auto program rate filings made by American Southwest Insurance Managers, Inc. and Old American County Mutual ("Old American"). Specifically, the requestor asks for the rate filing revisions made in June, August, and September of 2002 regarding American Southwest State & County Mutual, American Southwest Vesta Monthly, American Southwest Vesta Semi-Annual Select, American Southwest Vesta Semi-Annual, American Southwest Old American Monthly, and American Southwest Old American. You state, and provide documentation showing, that you notified Old American of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). You state that the other requested filings have been released to the requestor. You make no arguments regarding the proprietary nature of the requested information pertaining to Old American. You claim that a portion of the information is excepted from disclosure under section 552.137 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by Old American. *See* Gov't Code § 552.305.

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

As a preliminary matter, we note that the department previously requested a decision from this office regarding the public availability of program rate filings by Old American. We ruled on that request in Open Records Letter No. 2002-3890 (2002), issued July 17, 2002. To the extent the information at issue here is identical to the information at issue in Open Records Letter No. 2002-3890, the department may rely on that decision as a previous determination regarding the public availability of the information. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (regarding previous determinations). With respect to responsive information, the public availability of which was not addressed in Open Records Letter No. 2002-3890, we address your claims and the arguments submitted by Old American.

Old American claims that its underwriting guidelines and rules pertaining to the American Southwest Old American and American Southwest Old American Monthly programs are excepted from disclosure under section 552.110 of the Government Code.² Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

² Old American does not seek to withhold the American Southwest Old American and American Southwest Old American Monthly program rates.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 661 (1999); *see also National Parks*, 498 F.2d at 770.

Upon review of Old American's arguments and the submitted information, we determine that Old American has demonstrated the applicability of section 552.110(a) to much of the information at issue. We find that Old American has demonstrated that its underwriting guidelines and rules pertaining to insurance programs are trade secrets. Thus, we determine that Old American has made a *prima facie* case under section 552.110(a) for that information and we have received no arguments to rebut this claim. The department must withhold the underwriting guidelines and rules pertaining to the Old American insurance programs at issue pursuant to section 552.110(a) of the Government Code. However, we find that Old American has not adequately demonstrated that the remaining submitted information consists of either trade secret information or commercial or financial information the release of which would result in substantial competitive harm to Old American. Therefore, we determine that Old American has not shown that the remainder of the submitted information is excepted under section 552.110.

Old American also argues that the submitted information is confidential under section 31.05 of the Penal Code.³ Section 31.05 provides in pertinent part:

(b) A person commits an offense if, without the owner's effective consent, he knowingly:

- (1) steals a trade secret;
- (2) makes a copy of an article representing a trade secret; or
- (3) communicates or transmits a trade secret.

(c) An offense under this section is a felony of the third degree.

Penal Code § 31.05(b), (c). We have already determined that the remainder of the information at issue does not consist of a trade secret. We also note that section 31.05 does not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987)*. Confidentiality cannot be implied from the structure of a statute or rule. *See Open Records Decision No. 465 at 4-5 (1987)*. Accordingly, the department may not withhold any portion of the submitted

³Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code.⁴

We note that the submitted information also contains e-mail addresses that have been provided by members of the public for the purpose of communicating electronically with the governmental body. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You inform us that no member of the public has affirmatively consented to the release of these e-mail addresses. We have marked the information the department must withhold under section 552.137.

In summary, the department must withhold underwriting guidelines and rules pertaining to the American Southwest Old American and American Southwest Old American Monthly programs from disclosure under section 552.110(a). The e-mail address of a member of the public must be withheld from disclosure under section 552.137. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

⁴ Old American asks this office to issue a previous determination to the department regarding the public availability of the company's underwriting guidelines. The department has not asked this office to issue a previous determination for this information. We decline to issue a previous determination regarding Old American's underwriting guidelines at this time.

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 175168

Enc: Submitted documents

c: Ms. Amy Perry
INSURQUOTE, Inc.
1125 West Center Street
Orem, Utah 84057
(w/o enclosures)

Mr. Bruce McCandless, III
Long, Burner, Parks, & Delargy, P.C.
515 Congress, Suite 1500
Austin, Texas 78701
(w/o enclosures)

Ms. Shannon Hill
Compliance Analyst
Old American County Mutual Fire
P.O. Box 700668
Dallas, Texas 75370-0668
(w/o enclosures)